TEOH GUAT LOOI
(THE LAWFUL WIDOW) CLAIMING FOR HERSELF
AND HER TWO CHILDREN AS THE DEPENDENTS
OF TAY KOK WAH, DECEASED

v.

NG HONG GUAN

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J
[CIVIL SUIT NO: 23-7-1992 (92)]
14 DECEMBER 1994

***TORT**: Fatal accident - Claim for damages - Liability - End of plaintiff's case - Defendant submitted no case to answer and elected to call no evidence at end of plaintiff's case - Whether balance of probabilities tilted by plaintiff - Whether Court bound to rule on liability.*

The plaintiff instituted a dependency claim against the defendant in respect of an accident in which her husband died. At the hearing of the claim, at the end of the plaintiff's case, Counsel for the defendant submitted that the plaintiff had not made out a case for the defendant to answer and hence requested the Court to make a ruling on liability. Counsel then informed the Court that he wished to call no evidence at all on behalf of the defendant. The issue that arose was whether, in the circumstances, the trial Judge ought to make the ruling requested for.

Held:
In a civil case a party must prove his case before the burden of proof shifts to the other side. In other words the balance of probabilities must first be tilted before the defendant makes his defence. In the circumstances, where the defendant has submitted at the ene of the plaintiff's case that the plaintiff has not made out a case, and thereafter elected to call no evidence, the Court is bound to make a ruling whether a case has or has not been made out for the defendant to answer. On the facts herein, this question has to be answered in the negative.

[Plaintiff's claim dismissed with costs]

Cases referred to:
Yuill v. Yuill [1945] 1 ALL ER 183 ***(refd)***
Laurie v. Raglan Building Co. Ltd. [1941] ALL ER (Vol. 3) at p. 332 ***(refd)***
Storey v. Storey [1960] 3 ALL ER 279 ***(refd)***

For the plaintiff - Lim Meng Huat; M/s. Izhar Haji Saidin & Co.
For the defendant - V.W. Balasingam; M/s. Gibb & Co.

JUDGMENT

Hj. Abdul Malik bin Hj. Ishak J:
On 20 August 1992 at about 9.15 p.m. as Ng Seng Wah (PW4) walked towards his stationary motorcar AW 2255 that was parked on the left side of the road known as Jalan Persiaran Dato' and as he stood by the right side of the driver's door of the stationary motorcar, a motorcar BCC 4647 driven by the defendant reversed from the right side of Jalan Persiaran Dato' and collided into the rear right portion of the stationary motorcar. That rear collision also hit Tay Kok Wah ("the deceased") who was standing at the rear right portion of the stationary motorcar. In the statement of claim, the plaintiff categorically averred that motor-

car BCC 4647 driven by the defendant negligently reversed and collided into the deceased. Unfortunately, Ng Seng Wah (PW4) the so called principal eye-witness for the plaintiff faltered in his evidence-in-chief and admitted, firstly, that he did not see motorcar BCC 4647 colliding into the deceased. Under cross-examination, Ng Seng Wah (PW4) admitted that a portion of his police report lodged on 21 August 1992 at about 4.35 p.m. (see the Agreed Bundle) was wrong particularly the following passage: "orang itu (referring to the deceased) telah dilanggar oleh motokar kawan saya (referring to the defendant)." Ng Seng Wah (PW4) again agreed under cross-examination that he did not see the deceased avoiding motorcar BCC 4647 as it reversed nor did he see the deceased jumping from the position where he last stood. In a nutshell, Ng Seng Wah (PW4) did not witness the accident.

In civil cases, a party must prove his case before the burden of proof shifts to the other side. In a criminal case, the prosecution's burden is a heavy one - to prove beyond reasonable doubt. In a civil case, it is on the balance of probabilities. That balance must be tilted by the plaintiff before the defendant makes his case.

Mr. V.W. Balasingam, learned Counsel for the defendant boldly took a step, in the right direction, and asked me to rule at the end of the plaintiff's case that the plaintiff had made out no case and, consequently, I had put learned Counsel for the defendant to elect as to whether he wishes to call evidence for the defence. Without further ado, the learned Counsel elected to call no evidence. Consequently, I am now bound to give a ruling. This must surely be the proper practice to adopt. As Lord Greene MR observed in *Yuill v. Yuill* [1945] 1 ALL ER 183; [1945] p. 15 that:

> The practice which has been laid down amounts to no more than a direction to the Judge to put Counsel who desires to make a submission of no case to his election, and to refuse to rule unless Counsel elects to call no evidence. Where Counsel has so elected he is, of course, bound: but if for any reason, be it through oversight or (as here) through a misapprehension as to the nature of Counsel's argument the Judge does not put Counsel to his election, and no election in fact takes place, Counsel is entitled to call his evidence just as if he had never made the submission.

Earlier on in 1941 whilst delivering the judgment for the Court of Appeal, Lord Greene MR in *Laurie v. Raglan Building Co. Ltd.* [1941] ALL ER (Vol. 3) at p. 332, especially at p. 337 said:

> The course which the trial took was this. After the evidence for the plaintiff had been concluded, on the question of liability Counsel for the defendants submitted that there was no case. It is unfortunate, I think, that the Judge did not follow the practice which ought to be followed in such cases, as has been quite clearly laid down in this Court - namely, the practice of refusing to rule on the submission unless Counsel for the defendants says that he is going to call no evidence.

It seems to me that from the tenor of these two authorities the proper procedure would be this: if a submission of no case to answer is made by the defendant in a negligence case, it is to require him to elect whether to stand on his submission, and if he does so there cannot thereafter be a new trial (see also *Storey v. Storey* [1960] 3 ALL ER 279).

I have taken particular care in this case to record the evidence of the plaintiff and her witnesses, almost verbatim. I have gone through the evidence and in my judgment Ng Seng Wah (PW4) has come to Court, taken the affirmation and told me deliberate lies. Finally when his conscience pricked him, he crumbled and told this Court that he did not witness the accident. Even the sketch plan (see the Agreed Bundle at p. 9) drawn by Sergeant 41170 Mustapha bin Yusof (PW6) did not assist the plaintiff at all. When the said Sergeant arrived at the scene the two motorcars were not there and there were no glass fragments on the

road at all. The sketch plan did not show as to how the accident took place; it merely showed the site of the accident. Surely this kind of sketch plan would be of no use to the plaintiff. To add insult to injury, Corporal 90178 Salliah bte Ishak (PW5) lodged a police report when the deceased was first warded at the hospital (see the Agreed Bundle at p. 8) and in her police report she gave the reason for the accident to be: "akibat kemalangan jalan raya di Jalan Lahat (kereta terbabas)." This runs counter to the Statement of Claim and the said Corporal explained under examination-in-chief that she obtained the details from the admission book of the hospital. Again the said Corporal made a mistake in regard to the location of the accident: it was not at Jalan Lahat but rather at Jalan Persiaran Dato'. It is most unfortunate for the widow to lose her husband at so young an age and be saddled with two children. But the law is clear. The plaintiff must prove her case. On the available evidence, I ruled that the plaintiff had made out no case and, I, dismissed it with costs.